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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN J. TONER, Judge
Petitioner,

vs.

STATE ex rel. FREDDIE CODY,
Respondent.

ON WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

BRIEF IN OPPOSITION

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STATUTES

Ohio Revised Code §§3111.02, 3111.03,
3111.07 (A), 3111.08 (A), 3111.09 (A) &
(B), and 3111.12 (D) as set forth in the
Appendix.

STATEMENT OF THE CASE

The statement of the case presented by petitioner is accurate, except that at page 4, petitioner failed to note that the Court of Appeals dismissed respondent's complaint in mandamus on February 15, 1983 because it believed there was an adequate remedy at law. The Court of Appeals did not address the merits of respondent's constitutional claims.

SUMMARY OF ARGUMENT

1. The state court decision below rests upon an adequate and independent state ground. The state court did not believe that its decision was compelled by federal law. Therefore, this Court lacks jurisdiction to review the decision.
2. The decision below is correct in light of the complexity of Ohio's paternity statutes. Therefore, this Court

should exercise its discretion not to review the decision.

In State, ex rel. Cody v. Toner, Judge, 8 Ohio St. 3d 22 (1983), the Ohio Supreme Court held as follows:

The denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions. (emphasis added)

Judge Toner has now requested a writ of certiorari to review this decision. It will be shown below that the writ should not be granted because this Court lacks jurisdiction, and because even if there were jurisdiction, the holding below is correct and does not warrant review.

ARGUMENT

1. The state court decision below rests upon an adequate and independent state ground. The state court did not believe that its decision was compelled by federal law. Therefore, this Court lacks jurisdiction to review the decision.

The key portion of the decision below, State, ex rel. Cody v. Toner, 8 Ohio St. 3d 22 (1983), is its discussion of the need for counsel to insure the accuracy and integrity of paternity proceedings in Ohio. In this portion of the opinion, the Court reaffirms the vitality of an Ohio Supreme Court case interpreting the Ohio constitutional guarantee of due process in a manner which is broader than this Court's interpretation of the United States Constitution. For this reason, it is clear that Cody does not present a sit-

uation where "the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, 103 S.Ct. 3469, 3471 (1983). Therefore, this Court does not have jurisdiction to review the state court judgment. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 490, (1965).

In analyzing the importance of appointed counsel to the integrity of the paternity proceedings, the court below looked for guidance to State, ex rel. Heller v. Miller, 61 Ohio St. 2d 6 (1980). (Petition Appendix, hereafter P. App. A4) In Heller, the Ohio Supreme Court held that in a proceeding to terminate parental status, indigent parents have due process and equal protection rights under the Ohio and United States Constitutions to appointed counsel for appeals as of

right. In Cody, the Court extended this holding to paternity cases at the trial level. (P. App. A5). The Heller decision was reaffirmed despite the fact that subsequently, this Court in Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981), held that the failure to appoint counsel generally in proceedings for termination of parental status did not offend the due process clause of the United States Constitution. As the Ohio Supreme Court is aware of Lassiter (see, Anderson v. Jacobs, 68 Ohio St.2d 67, 73 (1981)), the logical inference from this sequence of events is that the court below still considers State ex rel. Heller v. Miller, supra, as good authority with respect to its interpretation of the Ohio Constitution, despite the Lassiter ruling.

It is clear from the precedent cited on the face of the decision that the court below did not believe itself compelled by federal precedent to recognize the importance of counsel to the integrity of a civil proceeding. See, Michigan v. Long, supra, 103 S. Ct. at 3477. Because Heller remains good law in Ohio, a decision by this Court on the merits would be nothing more than an advisory opinion to the Ohio Supreme Court. With an independent and adequate state ground controlling the Ohio Supreme Court's decision, this Court does not have jurisdiction to review it.

2. The decision below is correct in light of the complexity of Ohio's paternity statutes. Therefore, this Court should exercise its discretion not to review the decision.

Even if this Court has jurisdiction to review the decision below because the

Ohio Court felt compelled by federal law to reach the decision it did, which respondent adamantly denies, this Court should decline to exercise such jurisdiction.

Under Ohio's paternity statutes, an indigent defendant is confronted with an extensive array of rights and potential obstacles both before and during trial. He clearly needs the assistance of counsel to guide him in his choices and conduct.

These statutory provisions include the following. The defendant has a right, upon motion, to have blood grouping tests performed without prepayment of costs. O.R.C. §3111.09 (A). Expert testimony regarding the results of these tests is admissible at trial even if the results do not exclude him as the father. O.R.C. §3111.09 (B). The defendant has a right to a trial by jury, but he must file a timely

demand. O.R.C. §3111.12 (D). He should be familiar with all the Ohio Rules of Civil Procedure including the rules governing discovery, since these rules govern the proceedings unless a different procedure is specifically provided for by statute. O.R.C. §3111.08 (A). Where, as here, the child was born during a marriage to another man, the ex-husband may be joined in the action if this matter is brought to the Court's attention. O.R.C. §3111.07 (A). In four specified sets of circumstances, a defendant will be required to overcome a presumption of paternity by clear and convincing evidence. O.R.C. §3111.03. This unusually heavy burden will not easily be understood, let alone met, by the average paternity defendant unaided by counsel.

This scheme is far more complex than

the procedurally straightforward parental status termination proceeding which the Court addressed in Lassiter, supra, 452 U.S. at 28-29. Ohio's paternity statutes require difficult decisions both before and at trial. By contrast, in the parental status termination proceedings discussed in Lassiter, expert testimony is unusual; there are no sophisticated scientific test results to be analyzed and evaluated; there is no provision for a jury trial; the full panoply of civil rules, including discovery procedures, does not apply. Furthermore, under the North Carolina procedure at issue in Lassiter, the state often appears without counsel. In Ohio paternity cases brought to recover a welfare set-off, the state routinely appears by counsel.

Under these circumstances, the Ohio

Supreme Court concluded that one "unknowledgeable of his rights could easily go astray in conducting his defense." (P. App. A5). Since the Ohio Supreme Court concluded that the complexity of this type of proceeding will overwhelm the uncounselled defendant in this class of cases, the presumption against the right to counsel in civil proceedings is negated, and the Ohio Supreme Court's decision is not inconsistent with Lassiter.

The Ohio statutory scheme also deflates petitioner's last ditch contention. In the last sentence of his argument, petitioner contends that "there appears to be a conflict between the Cody, supra, decision and Washington Supreme Court's decision in Washington v. Walker, 87 Wash. 2d 443 (1976)." (Petition at p. 8) (sic) (case is State v. Walker). This conflict is more apparent than real because the two cases

turn on different facts, procedures, and law. For example, in Cody, the court below placed great weight on the need for learned assistance with respect to the blood grouping tests authorized without prepayment by state law and on "the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered." (P. App. A5). By contrast, at the time State v. Walker, supra, was decided, Washington state law did not authorize blood grouping tests without prepayment. Further, expert testimony would have been largely unnecessary because the tests available in 1976 were far less sophisticated and complex than those available in 1983. Finally, the decision of the Washington Supreme Court predates and is not informed by this Court's decision in Lassiter, supra.

The Ohio Supreme Court is particularly well situated to evaluate the complexity of Ohio's paternity procedures and the need for counsel to insure the fairness and accuracy of the proceedings. Accordingly, this Court should deny review.

CONCLUSION

Because the decision below rests upon an adequate and independent state ground, this Court lacks jurisdiction to review it. Even if there were jurisdiction, this Court should decline to exercise it because the Ohio decision is correct. The petition should accordingly be denied.

Respectfully submitted,

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acknowledged.

APPENDIX

The Ohio Revised Code Sections cited in this brief are as follows:

3111.02 Parent and child relationship; how established

The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child or pursuant to this chapter. The parent and child relationship between a child and the natural father of the child may be established pursuant to this chapter. The parent and child relationship between a child and the adoptive parent of the child may be established by proof of adoption or pursuant to Chapter 3107. of the Revised Code.

3111.03 Presumptions as to father and child relationship

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate

pursuant to a separation agreement.

(2) The man and the child's mother attempted, before the child's birth, to marry each other by a marriage that was solemnized in apparent compliance with the law of the state in which the marriage took place, the marriage is or could be declared invalid, and either of the following apply:

(a) The marriage can only be declared invalid by a court and the child is born during the marriage or within three hundred days after the termination of the marriage by death, annulment, divorce, or dissolution;

(b) The attempted marriage is invalid without a court order and the child is born within three hundred days after the termination of cohabitation.

(3) The man and the child's mother, after the child's birth, married or attempted to marry each other by a marriage solemnized in apparent compliance with the law of the state in which the marriage took place, and any of the following occur:

(a) The man has acknowledged his paternity of the child in a writing sworn to before a notary public;

(b) The man, with his consent, is named as the child's father on the child's birth certificate;

(c) The man is required to support the child by a written voluntary promise or by a court order.

(4) The man, with his consent, signs the child's birth certificate as an informant as provided in section 3705.14 of the Revised Code.

(B) A presumption arises under di-

vision (A)(3) of this section regardless of the validity or invalidity of the marriage of the parents. A presumption that arises under this section can only be rebutted by clear and convincing evidence. If two or more conflicting presumptions arise under this section, the Court shall determine, based upon logic and policy considerations, which presumption controls.

3111.07 Necessary parties; intervenors

(A) The natural mother, each man presumed to be the father under section 3111.02 of the Revised Code, and each man alleged to be the natural father, shall be made parties to the action or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard. The court may align the parties. The child shall be made a party to the action unless a party shows good cause for not doing so. Separate counsel shall be appointed for the child if the court finds that the child's interests conflict with those of the mother.

3111.08 Procedure

(A) An action brought pursuant to this chapter to declare the existence or nonexistence of the father and child relationship is a civil action

and shall be governed by the Civil Rules unless a different procedure is specifically provided by this chapter.

3111.09 Genetic tests

(A) In any action instituted under this chapter, the court may, upon its own motion or upon the motion of any party to the action that is made at a time so as not to unduly delay the proceedings, order the child's mother, the child, the alleged father, and any other person who is a defendant in the action to submit to genetic tests. Any fees charged for the tests shall be paid by the party that requests them unless the court orders the fees taxed as costs in the action. If the court orders the fees taxed as costs in the action, if the custodian of the child is represented by the agency that is designated in the county to provide enforcement of child support orders under Title IV-D of the "Social Security Act," 49 Stat. 629 (1935), 42 U.S.C. 301, as amended, if the custodian is a recipient of aid to federally dependent children payments for the benefit of the child, and if the defendant in the action is found to be indigent, then the designated child support enforcement agency is authorized, within guidelines contained in federal law, to pass through all costs of the tests. Any costs passed through in such a manner are in addition to any amount provided for under any contractual provision for specific fund-

ing allocations for the agency between the county, the state, and the federal government.

(B) The genetic tests shall be made by qualified examiners who are appointed by the court. The examiners may be called as witnesses to testify as to their findings. Any party may demand that other qualified examiners perform independent genetic tests under order of the court. The number and qualifications of the independent examiners shall be determined by the court.

3111.12 Testimony; jury trial

(D) Any party to an action brought pursuant to this chapter may demand a jury trial by filing the demand within three days after the action is set for trial. If a jury demand is not filed within the three-day period, the trial shall be by the court.

If the action is tried to a jury, the verdict of the jury is limited only to the parentage of the child, and all other matters involved in the action shall be determined by the court following the rendering of the verdict.